powers to hold him if he is a disturber of the peace, to give security to keep it, and to be of good behaviour, as they shall think right. I am satisfied that the conclusions I have arrived at are sustained by law, and are conducive to the peace and best interests of this community.

I have so far taken no notice of the fact that the prisoner commenced running the cars at or about one o'clock of the day, and that he was instructed to move slowly by the churches on the route. The rights of the people to the quiet of the entire day must not be made dependent upon the caution with which it is violated.

If it amounts to a disturbance, it is a breach of the peace, and if the public are entitled to an undisturbed portion of the day, they are to the whole of it. Nor was it the right of the prisoner, or his employers, to assume that the people will perform those religious exercises before one o'clock P. M., or risk disturbance.

They are neither to be constrained in the form of worship, time of worship, nor to engage in it at all, by any power, much less by conventional regulations to which they are no parties. Freedom on this point is a guarantee of the constitution.

Discharge refused and the prisoner remanded, but he may now enter into recognizance with security to appear at the next Quarter Sessions.

RECENT ENGLISH DECISIONS.

In the Court of Exchequer.

SOLOMON *vs.* THE VINTNERS' COMPANY.[1]

1. Plaintiff owned a house, adjoining it was a house of a third person, and adjoining this third person's house were two houses of defendants. The four houses for more than thirty years past were all of them out of the perpendicular, leaning to the west. Defendants contracted to have their houses (which were the most westward) pulled down, and others erected in their places. The contractor pulled them down, and by so doing the plaintiff's house fell and did damage: *Held*, that the plaintiff had not established his claim to a right of support for his house, and enjoyed as of right from the defendants through the medium of the plaintiff's house being supported by the intermediate house which leaned upon the defendants'.

[1] London "Law Times."

The plaintiff was the owner and occupier of a house in Pilgrim street, Ludgate-hill, London. It was built on a hill, and had a slight descend towards the west; adjoining to and next below the plaintiff's was another house belonging to a third person, and next adjoining to this were two houses belonging to the defendants, one of their houses being a corner house of the street, the other in the adjoining street. For more than thirty years the four houses were all of them out of the perpendicular, leaning to the west. It did not appear when the houses were built, or that there was any connection between them in title or otherwise. The lease granted by the defendants of their houses expired in 1857. They contracted with one Mr. Robins to pull them down, erect two others in their place, and to grant him a lease of them. Robins pulled them down, and in consequence the plaintiff's fell, doing considerable damage. The plaintiff then brought this action against the defendants to recover from them for the injury and for the loss he had sustained. At the trial before Martin, B., in London, the plaintiff was nonsuited, with leave reserved to enter a verdict as the court should direct, the court to have power to make any amendment in the declaration that may be necessary to impose liability upon the defendants, if it could be imposed; or, if they were not liable upon the evidence, the court to direct accordingly; or, if the court thought defendants were liable, the question of damages to be referred to an arbitrator as the court may appoint. A rule *nisi* having been obtained accordingly,

Edwin James, Q. C., *Hawkins*, Q. C., and *D. D. Keane*, showed cause for defendants.

Blackburn and *Honyman*, contra, for plaintiff.

The following cases were referred to:—Baten's case, 9 Coke, 54 a; *Brown* vs. *Windsor*, 1 Cr. & J. 20; *Rex* vs. *Rosewell*, 2 Salk. 459; *Chauntler* vs. *Robinson*, 4 Ex. 163; *Thompson* vs. *Gibson*, 7 M. & W. 456; *Palmer* vs. *Fletcher*, 1 Siderfin, 167; *Stansell* vs. *Jodrell*, 1 Sel. N. P. 457; *Hide* vs. *Thornborough*, 2 Car. & K. 250; *Rowbottom* vs. *Wilson*, 8 E. & B. 120; Gale on Easements, p. 234, "Negligence," p. 307, "Obligation to repair;"

Humphreys vs. *Brogden*, 12 Q. B. 739; *Richards* vs. *Rose*, 9 Ex. 218; *Pye* vs. *Carter*, 1 H. & N. 916; *Gayford* vs. *Nicholls*, 9 Ex. 702; *Nicklin* vs. *Williams*, 10 Ex. 259; *Chadwick* vs. *Trower*, 3 Bing. N. C. 334.

Cur. adv. vult.

POLLOCK, C. B., delivered judgment.—I have to deliver the judgment of myself, my brother Martin, and my brother Channell. My brother Bramwell does not differ in the result, but I believe he will express his own views on shorter grounds. He agrees with the judgment of the court, but does not adopt all the reasons which I am about to mention. This was an action tried before my brother Martin at Guildhall, at the sittings after last Hilary Term. The plaintiff complained of an injury occasioned to his dwelling house by the taking down and removal of two houses, the defendants' property, under the circumstances after mentioned. The facts proved at the trial were these:—The plaintiff was the owner of a house in Pilgrim street, in the city of London. His house was built on a hill, having a descent towards the west; there was a house next below his, and adjoining to the plaintiff's house, belonging to a third person, and the defendants were the owners of the two houses next adjoining. One of the defendants' houses was a corner house of the street, and the other was in the adjoining street. For upwards of thirty years the four houses were all of them out of the perpendicular, leaning to the west, and this might have been seen by any one passing by. There was no evidence how or when this occurred, or when the houses were built, or that there was any connection between the houses, either in title, occupation, possession or otherwise. In 1857 the lease of the defendants' houses expired, and they entered into a contract with a person of the name of Robins, that he should pull them down and erect two other houses in their place, and that, on this being done, they would grant him a lease upon an agreed rent. Robins proceeded to pull down the houses, and, in consequence, damage was caused to the plaintiff's house; and the question is, whether these facts show any liability on the part of the defendants. For the purpose of the argument, it is to be assumed that Robins acted with

negligence. The defendants contended that the facts before stated afforded no evidence that the plaintiff had acquired, or had, as alleged by his declaration, a right to have his house in any way supported by the houses of the defendants, and that they were not liable for the negligence of Robins, their contractor, in taking them down under the contract referred to. The plaintiff, on the other hand, contended that, upon the facts proved, he had acquired a right to the support of the defendants' houses; but if the defendants, by themselves or their servant, had taken the houses down and deprived the plaintiff of the support thereof, the very act of removing the support to which he was entitled, however carefully done, had entitled him to maintain an action against the defendants, and that the taking down was an act done by Robins by their authority and direction, and was the same as if it had been done by themselves. It was admitted by the learned counsel for the plaintiff that, on the existing authorities, the defendants would not be responsible for the mere negligence of Robins. My brother Martin, at the trial, was of opinion, that the defendants were not liable, and directed a nonsuit, with leave to the plaintiff to move to enter the verdict for him, in which event it was agreed that all further questions should be referred to an arbitrator. A rule was accordingly obtained, which came on for argument in the course of the last term. It seems now to be well settled that the right of one man's land to support from the adjoining land is not an easement, or in the nature of an easement at all; but a natural right to the flow of the water that a natural river ought to have; *Rowbottom* vs. *Wilson*, 8 E. & B. 123. But the right to support for one building from an adjoining building is certainly not a natural right. It may arise in different ways. In *Partridge* vs. *Scott*, 7 M. & W. 220, Alderson, B., in delivering the judgment of the court with regard to a right very analogous, says that rights of this sort, if they can be established at all, must have their origin in grant. In *Peyton* vs. *The Mayor of London*, 9 B. & C. 736, Lord Tenderton intimated that, if it appeared that both houses were originally built by the same owner, the right to support might exist. In *Richards* vs. *Rose*, 9 Ex. 218, this court held that in the latter case

such a right did exist. Such a right or easement was recognized by the civil law. If the house removed had been the next adjoining the plaintiff's, we should have felt much embarrassed by some cases and *dicta*. In *Stansell* vs. *Jodrell*, Selwyn's N. P., and *Hide* vs. *Thornborough*, such a right of support is stated to be gained, if the houses have stood for twenty years; and in *Humphries* vs. *Brogden*, 12 Q. B. 749, Lord Campbell refers to these cases. It is extremely difficult to see how the circumstance of the houses having stood for twenty years makes any difference or creates a right. Where houses are supposed to have been built by different adjoining landowners, each with its own separate and independent walls, but that upwards of twenty years ago one of them got out of the perpendicular, and leaned upon, and was supported in part by the other, so that, if the latter were removed the other would fall, the question is, whether any right of support is thereby obtained? It cannot be a right of prescription, which supposes a state of things existing before the time of legal memory; nor does it seem to us to be a right under the Prescription Act, 2 & 3 Will. 4, c. 71, which has been hitherto confined to rights in their nature of a perpetual and permanent character, and the ownership of which is a fee-simple. It seems to us, that in the absence of all evidence as to origin or grant, the only way in which such a right can be supported is that suggested by Lord Campbell in *Humphries* vs. *Brogden*, namely, an absolute rule of law similar to that which is stated to have existed in the civil law. But there is no authority for any such rule to be found; at least, none was stated before us. Lord Campbell compares it to a right to lights. But this right is created by the express enactment of the 3d section of the statute before referred to, and it does seem contrary to justice and reason that a man, by building a weak house adjoining to his neighbors, can, if that weak house at all gets out of the perpendicular and leans upon the adjoining house, thereby compel his neighbor either to pull down his own house within twenty years so as to prevent a right from being acquired by twenty years' enjoyment, or to bring some action at law, the precise nature of which is not very clear, otherwise, it is said an adverse right would be acquired against him.

But these questions we refer to because they were matters of argument at the bar; it is not necessary to decide them in the present case. The defendants' houses were not next adjoining the plaintiff's, there was an intermediate one; and it is necessary to consider whether any of the grounds suggested as creating a right are supported by the evidence. As to any right arising from the non-removal of the defendants' houses, assuming it to be that a man who has a house suitable for his own purpose, must pull it down within twenty years, otherwise his neighbor, whose house may lean upon it, would have gained an adverse right of support, the evidence is defective; for it is plain, that during much the greater part of the thirty years during which the houses were out of the perpendicular, the defendants' houses were in the possession of tenants under leases; the defendants could not have pulled them down if they had been disposed so to do. But it was strongly argued that the defendants might have maintained an action against the plaintiff during the first twenty years of the leaning of his house upon theirs. When a house built upon the edge of a man's land gets out of the perpendicular, and leans or hangs over his neighbor's land, it no doubt occupies a space belonging to his neighbor—the rule of law being *cujus est solum ejus est usque ad cœlum.* But, assuming the neighbor could maintain an action to recover the space, or for interfering with it, the defendants could not have maintained such an action for the plaintiff's use of this projection over the defendants' soil, while it projected over the soil of intervening owners. It was said, however, that prior to the 1st June, 1837, now twenty-five years ago, a writ of *quod permittat* might have been brought; but even if this were so, it would be of no avail, for during fourteen of the twenty years this action has been abolished. It was said that, since then an action on the case might have been brought; but we apprehend that upon the evidence in this case the defendants could have maintained no such action. There was no evidence how the leaning originated. It may well have been that the defendants' houses were the first to give way, and that this was caused by some excavation in the street, for which they were in no wise responsible; and that the getting out of the perpendicular of the plaintiff's

house originated from the same cause. Under such circumstances we think the defendants could not have maintained an action on the case against the plaintiff. If the only evidence had been that, in this case, we entertain no doubt the judge would have been bound to have held that there was no evidence to go to the jury. The question, therefore, really comes to this, is there any authority in the law for the existence of such a right as that claimed by the plaintiff? We find none where the houses do not adjoin, and although we possibly might have acted upon those cases in Selwyn's work on Nisi Prius before referred to, if the circumstances had been the same, we are not disposed to extend the principle further than we feel ourselves compelled by authority. If there be such a rule of law as that suggested by Lord Campbell in *Humphries* vs. *Brogden*, the plaintiff's contention may be right, as already observed; we have not been referred to, and are not aware of, the authority. It is also suggested that the right to light is conferred by the enactment of the Legislature, and not by common law. The rule, therefore, to set aside the nonsuit will be discharged.

BRAMWELL, B.—I think that the rule ought to be discharged, and I do not dissent from any reason given by my Lord for discharging the rule. But the reasons there given seem to me to involve questions of very great difficulty and importance, and I would rather not pronounce an opinion on them without a great deal more consideration than I have been able to give them. I certainly would not do it in any case without some necessity for so doing, which I do not see here; because I see there is ground upon which the defendants are clearly entitled to our judgment, and it is this: where a house leans as this does, the owner of it may make two claims in respect of it upon his neighbor—one, a general right to impend and occupy a portion of his ground as it were, and to hang over and occupy a portion of air over it—the space over it; another right would be a right to support from the walls of the house of the neighbor. Now, the former claim is here out of the question, because it does not impend over the defendants' land—the plaintiff's house did not. Therefore the question is limited to the latter; and accordingly Mr. Blackburn's contention was, that the

plaintiff had a right of support for his house through the medium of its being supported by the intermediate house, which leaned upon the defendants', as he said. Well, now the right, as I understand, was this: it was a right to have the support while the defendants' house stood there; it was a right to have the defendants' house continue to stand there to give that support; and it was a right, when the defendants' house would no longer stand of itself, on the part of the plaintiff to go on and repair it, and make it sufficient to bear the weight of the plaintiff's house. Now, that is a claim which, to my mind, is extravagant upon the very enunciation of it; but, for aught I know, it is one which may exist in point of law. Supposing it does exist as a matter of absolute right, or supposing it to exist as a matter of prescription, or under the Prescription Act, or as founded on some supposed lost grant—in any of these cases it can only exist if the benefit which is claimed was one that was enjoyed as of right. Now, a thing cannot be enjoyed as of right, unless it is openly and visibly enjoyed. An enjoyment must neither be *in precario* nor *clam;* it must be open. Now, when you see one house leaning towards another, you may make a tolerably shrewd guess that it is partly supported by the other; but it is but a guess. You cannot tell. It may be that they have both slipped, and both stand, I think the expression is—upon the square—self-supporting; and it may turn out, and it may be the fact, that the house which leans towards the other affords as much support to that other, by the two being joined or sticking together in some way or another, as the other affords to it. One cannot tell, upon the face of it, that it is being supported. Well, it is true, as in this case, that that result has flowed as was said, because, when the defendants' house was removed, down came the plaintiff's; and, probably, nobody who saw the whole concern, would have guessed it was so. But it would have been but a matter of judgment, and therefore, to my mind, supposing that the plaintiff for more than twenty years had an enjoyment, which, he says, now ought to continue, it was an enjoyment *clam*, not open, and consequently not as of right. It appears to me, therefore, that on that ground there has been nowhere that which is called adverse enjoyment, or enjoyment as of

right, and that which Mr. Blackburn claimed for his client; consequently, that no title was gained under any of the different ways in which it has been surmised it might have been gained. It seems to me on that ground, (of course I bear in mind that there is an intermediate house,) the defendants are entitled to our judgment.

MARTIN, B.—If I had been one of the jury, I should have found a verdict for the defendants on the ground stated by my brother Bramwell. I think it was a question for the jury clearly. As I have already said, it strikes me, if that is the correct view of the case, it was a question for the jury, and not one of law.

Rule discharged.

Court of Exchequer.—Trinity Term.—June 4.

DUCKWORTH, ADMINISTRATOR, *v.* JOHNSON.[1]

1. In order to maintain an action under the 9 and 10 Vict. c. 93, actual damage must have accrued from the death of the deceased. Proof of the death and relationship of the parties does not give a right to nominal damages.
2. In an action under that statue by a father for the death of his son, it was shown that the deceased earned a certain weekly sum, which he brought into the general stock of the family:—Quære, whether, in order to maintain the action, the plaintiff should have given evidence that the weekly expense of keeping the deceased did not exceed that amount?

This was an action to recover damages under the 9 and 10 Vict. c. 93.[2] The declaration alleged that the plaintiff was administrator of one J. Duckworth; that a certain wall of the defendant fell on the deceased and caused his death, whereby the plaintiff was put to great expense, and the plaintiff and the mother of the deceased were deprived of and lost much pecuniary and other assistance, and sustained pecuniary loss. To this the defendant pleaded not guilty, and at the trial a plea was added denying that the plaintiff and the mother of the deceased were deprived of or lost any pecuniary or other assistance, or sustained any pecuniary loss. At the trial, be-

[1] London Jurist.

[2] Many of the States have enacted this English act with some modifications. See 1 Tidd's Pract., Amer. ed.—*Eds. Am. L. Reg.*